FIRST AMENDMENT WATCH

NAT HENTOFF

Free speech: A bumpy road

THE FIRST ENTRY IN THE Bill of Rights consists of a bare forty-five words; and yet, at any given time, the nation—from its streets to its highest court—provides abundant evidence of the difficulties and confusions attendant on implementing that one resounding sentence. Some of the problems are variations on chronic conflicts (church-state, for instance). Others involve extensions of previous rulings (e.g., the rights of student journalists). And many are based on obdurate misunderstanding of both the spirit and letter of the First Amendment.

The Oregon Civil Liberties Union —by way of illustrating the continual battle against invincible ignorance— is challenging the constitutionality of a state law mandating that no history or government text selected by the State Textbook Commission "speak slightingly of the founders of the republic or of those who preserved the union or which belittles or undervalues their work." Consider what the reaction to this suppressive ordinance might have been from James Madison who, when framing the First Amendment, particularly emphasized the need for the citizenry to be able to criticize all public officials and figures, certainly including his colleagues, the founders.

In Montana, meanwhile, the feminist book, *Our Bodies, Ourselves*, has been banished from the Helena schools by the trustees of the school district. This form of censorship is not uncommon; nor is the suit filed against it, on First Amendment grounds, by the Helena Citizens for Freedom of Expression. Somewhat unusual—because it is so baldly, openly Tory—is the declaration made by a state prosecutor as he threatened to bring criminal charges against any teacher or librarian giving the book to a minor: "Americans have genuflected too long at the altar of free speech."

The state prosecutor might have been heartened, however, by the reaction of the citizens of Winston-Salem, North Carolina, to a Ku Klux Klan–sponsored exhibit of Klan icons and regalia in the city's main public library. The assistant director of the library had pointed out that *any* group with material of "interest to the public" was entitled to space. However, he acknowledged that of the hundreds of calls generated by the Klan exhibit, *all* were opposed to the library's action. "The public doesn't understand," said the assistant director, "that we don't endorse the Klan—we endorse free expression." The public didn't understand; a scuffle at the library brought about the closing of the display an hour after it opened.

During the Skokie wars, of course, the public also did not understand that the American Civil Liberties Union was not endorsing the Nazis, but rather the First Amendment. However, there are always some exceptions: Larry Little, a member of the Winston-Salem Board of Aldermen, and former head of the city's Black Panthers, supported the library's giving the Klan a visual forum. After all, he said, the library had welcomed Black Panther exhibits in the past.

On the other hand, there are blacks and feminists, sometimes allied, who believe that it is essential to obliterate "bad" expression. Especially in books for children. From this kind of advocacy of therapeutic censorship has come a decision by the Des Moines, Iowa, school board to seriously consider the recommendation of an advisory committee that 104 books be purged from kindergarten to third-grade schoolrooms as racist and sexist. The notion that it might be instructive for children to see and compare different approaches—rather than to be exposed only to the "correct" line—is scorned by progressive vigilantes, just as it is by reactionaries.

OCCASIONALLY, HOWEVER, there are First Amendment victories, even despite the opposition of a powerful governor who would like to be a great deal more powerful. One such triumph had to do not with schoolbooks, but with masks. A California statute had made it a crime to wear a mask in public. Several Iranian students who had been involved in nonviolent protest of American policy in Iran were charged with violating that law. They were defended by the ACLU, which had also introduced a bill in the state legislature repealing the statute. The repeal passed both houses, but was vetoed by Governor Jerry Brown who explained, with the fortitude of a true Presidential candidate: "This is not the year to reduce the penalty for wearing masks."

The First Amendment prevailed, though, when the state court of appeal declared the mask law unconstitutional. Said the court, admonishing California prosecutors, "The state vigorously defends a statute which, if

The California mask ban would have outlawed Sam Adams before he even got to the Boston Tea Party.

205 years ago the Royal Colony of Massachusetts had had . . . Sam Adams and Paul Revere, with their band of colonials disguised as Indians, might never have reached Boston Harbor. And the greatest Tea Party in our history would never have occurred. And there, unlike here, there *was* an intent to do a wrongful act." The decision leaves standing another California law that makes it criminal to wear a mask

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It was dismaying to see the Massachusetts Civil Liberties Union so divided over Sambo's restaurant's right to keep its name.

in connection with criminal activity—like robbing a bank. What the court has recognized is that anonymous, peaceful political protest is as fully protected by the First Amendment as anonymous political speech.

Sometimes, the courts become involved in issues much thornier than anonymous political protest. In January 1979, in a little-noted decision, the Pennsylvania Supreme Court provided an intriguing variation on a previous United States Supreme Court ruling. Both cases are called *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, but the emphasis is quite different. Or seems to be.

The first, decided in 1973, concerned a Pittsburgh ordinance forbidding newspapers to classify help-wanted advertisements in columns captioned "Male Help Wanted," "Female Help Wanted." When the *Pittsburgh Press* nonetheless used such headings, the National Organization of Women filed a complaint with the Pittsburgh Commission on Human Relations. The commission ruled that the newspaper was acting illegally and must stop all sex-designated columns. Claiming that the First Amendment protected it from interference by the Commission on Human Relations, the *Pittsburgh Press* argued that exchange of information is as important in the commercial realm as in any other, and so commercial speech should not be distinguished from any other kind of speech. The state had no right to censor its editorial columns, and it should have no power over its want ads.

By a 5-to-4 vote, the High Court decided against the newspaper. While certain kinds of commercial speech might be protected by the First Amendment, it said, these particular ads were in direct violation of a Pittsburgh law. Segregation by gender in the want ad columns of the *Pittsburgh Press* must end.

In dissent, William O. Douglas insisted that the First Amendment does cover commercial speech and so, the Pittsburgh law itself is illegal because it censors the press. And Justice Potter Stewart warned: "So far as I know, this is the first case in this or any other American court that permits a government agency to enter a composing room of a newspaper and dictate to the publisher the layout and makeup of the newspaper's pages. This is the first such case, but I fear it may not be the last . . . If government can dictate the layout of a newspaper's classified advertising pages today, what is there to prevent it from dictating the layout of the news pages tomorrow?"

THIS YEAR, WHEN THE Pittsburgh Press and the Pittsburgh Human Rights Commission clashed again, there was a new twist. Back in the help-wanted pages, the *Press* had been accepting "Situations Wanted" ads from prospective *employees* in which, for reasons of their own, some gave their race, religion, or sex. The Human Rights Commission protested that this kind of information violated the state's Human Relations Act, which bars such advertising to avoid discrimination in employment.

This time, the Pennsylvania Supreme Court agreed with the newspaper. The law, it said, applies to employers, not to individuals who have a First Amendment right to say what they wish about themselves. They are "proposing commercial transactions —their own employment—that are not illegal." (Some of the actual ads: "White woman desires day work, office cleaning." "Born again Christian with Bachelor's Degree . . . seeking work with Christian business organization.")

But what if an employer bent on discrimination saw these ads and thereby knew exactly whom not to hire? He could find out anyway, said the court, "simply by scheduling a pre-employment interview or by requesting submission of a résumé."

The state court's decision may indicate that it saw the United States Supreme Court's ruling in the original *Pittsburgh Press* case as an unwarranted intrusion into speech, albeit commercial speech. After all, as Mr. Justice Douglas had said, if it were proved that an employer had established a pattern of discriminating by race or sex or whatever, an action could then be taken against him under the nondiscrimination law. It was not necessary, or constitutional, to diminish the First Amendment in an attempt to *prevent* such illegal action on his part. That is, the First Amendment rights of both the newspaper and its advertisers should have prevailed over the statute.

An intriguing battle over another kind of commercial speech, connected by some with racial discrimination, has been taking place in Massachusetts. There, as in other states, a restaurant chain named "Sambo's" had been irritating many blacks and quite a few whites because the restaurant's name, they allege, is racist. (Echoes of *Little Black Sambo*, a book that censors who consider themselves egalitarian have been trying to remove from school libraries.)

A group of civil rights activists urged Massachusetts Attorney General Francis X. Bellotti to file a court action forcing the restaurant operation to cease and desist from using the name "Sambo's." On what basis? Because it is so insulting to blacks that it discourages their patronage of the restaurants and is thereby a violation of Massachusetts' public-accommodations law. In his argument, Bellotti insisted that a sign saying "Sambo's" is equivalent to a sign saying "No Blacks Allowed."

However, as Harvard law professor Alan Dershowitz has pointed out, "blacks are, of course, allowed in Sambo's; indeed, none has ever claimed exclusion or actual discrimination. Many blacks—as well as some whites —simply *choose not* to patronize a restaurant with a name that is deemed offensive."

THE NOTION THAT ANY sign—no matter whom or how many it offends—should be erased by the state is wholly contemptuous of the First Amendment. A sign is speech. It is not surprising that some civil rights activists do not under-

stand this, for they are no more attuned to full civil *liberties* protections than are reporters or Internal Revenue Service agents or supermarket managers or any other group. But what is dismaying about the "Sambo's" furor is that the Massachusetts Civil Liberties Union, its board divided on the issue, did not file an amicus brief opposing the attorney general's move to expunge the signs. A brief was drafted, but somehow, the Massachusetts CLU missed [*sic*] the filing deadline. The national office of the ACLU is somewhat mortified, but has not said so publicly.

An ACLU affiliate may sometimes duck a First Amendment issue, but that's nothing compared to the astonishing constitutional ignorance of some judges. William Raspberry in the *Washington Post* has told of an order by Judge Frank Placzek of the Hampton County Probate Court in Massachusetts that tramples on the speech and religion clauses of our foremost amendment. When Wayne Felton was married, he and his wife were members of the Congregationalist Church. They are now divorced and he has become a Jehovah's Witness. On his court-ordered visits to his daughters, Fenton has been given to reading the Bible with them and discussing religion, presumably the doctrines of the Witnesses. "He was [also] confusing them by telling them there was no Santa Claus, no Easter Bunny, no Tooth Fairy, and I had told them there was," his former wife adds.

She complained, and Judge Placzek ordered Fenton to stop reading the Bible and sharing his particular exegeses with his daughters. If Fenton does not obey the court order and censor himself while with his children, he will lose his visiting rights. The mother, accordingly, is free to limit their religious intake entirely to Congregationalist tenets. In one blow, the judge has violated Fenton's free-speech rights, as well as his right to freely exercise his religion, while also allowing the ex-wife, with state support, to "establish" a religion.

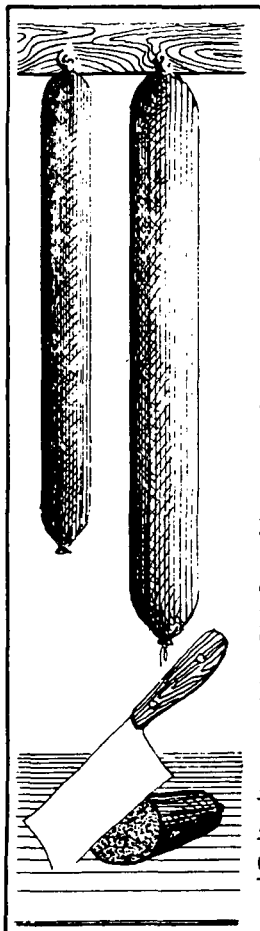
While free-speech losses do occur in some places, there are advances in others. The rights of student journalists, which have become considerably strengthened in court battles, now extend in at least one state to the possession of official press cards (an indispensable aid to the gathering of much news outside the school). After the American Civil Liberties Union and the Student Press Law Center in Washington threatened to sue the state of Arkansas for violation of student journalists' equal-protection rights, the students got their press cards. They're stamped "student press," but they will provide access to various events, and they're a start toward full recognition of students as "working journalists," with full First Amendment protection.

*IN THE MEANTIME, SO SUC-*cessful have been many of the suits brought by student journalists to combat censorship by high-school administrators that a school attorney, Allen Schwartz, advised administrators at a recent meeting of the National Organization on Legal Problems of Education to let student editors and reporters alone. "The First Amendment," he noted, "is a powerful tool, and school officials won't win many cases." It's clear by now, he added, that students have the right to criticize the administration and otherwise to present political views.

Even if the paper is wholly subsidized by the school, Schwartz cautions, "the state is not the unrestrained master of what it creates." That is, once a school sets up a paper, the paper becomes a First Amendment forum, with constitutional protections for its writers and editors. So, "even if they're a burr in your side," says Schwartz, "let them be." Sure, administrators can try to move in on questions of obscenity, defamation, or an article that may "substantially disrupt or materially interfere with school activities." But each time, the burden is on the administrator to prove, even legally define, those categories.

The First Amendment rights of students, Schwartz concluded, are a large element in the general expansion of students' legal rights, and "only in extreme cases would I challenge them."

His accurate assessment of the legal odds against school administrators with a yen for censoring reflects a rather remarkable change in the consciousness of both students and judges over the past ten years. And it is the most encouraging long-range omen for the future of the First Amendment. As Ben Bagdikian, a most judicious reporter and journalism professor, has put it: "If freedom of expression becomes merely an empty slogan in the minds of the young, it will be dead by the time they are adults." ❑



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